



Opting Out of the European Union
Diplomacy, Sovereignty and European Integration

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DOI:
[10.1017/CBO9781107337916](https://doi.org/10.1017/CBO9781107337916)

Publication date:
2014

Document version
Early version, also known as pre-print

Citation for published version (APA):
Adler-Nissen, R. (2014). *Opting Out of the European Union: Diplomacy, Sovereignty and European Integration*. Cambridge University Press. <https://doi.org/10.1017/CBO9781107337916>

1 Introduction

The euro crisis has led scholars, policy-makers, practitioners and the general public to conclude that the process of European integration has gone off course. Europe's crisis appears to be at a Titanic moment, which threatens to bring down not only the EU's major economies but also its political *raison d'être*. 'The future of the euro is inseparable from European unity,' said German Chancellor Angela Merkel in her address to the German Parliament in December 2011. At this point, Merkel received support to amend EU treaties to tackle the debt crisis that had shaken Europe and threatened the future of the common currency. Two years later, the EU suffered a damaging split when British Prime Minister David Cameron promised British voters a choice – to exit the EU or to negotiate a looser relationship with it. The question echoing across Europe was: what if the attempts to take back sovereignty represent the end of one of the most significant Western political projects since the Second World War?

As the EU has moved into areas that were exclusive to the nation-state, such as government budget-making, criminal law and border control, the image of a quasi-automatic integration process has appeared more frequently in public debates across Europe. During the past two decades, doubts over the benefits of EU membership have led to some member states opting out from EU treaties, indicating a preference for 'outsiderness' over full membership of the EU. During the Lisbon Treaty negotiations, the UK, Poland and the Czech Republic secured exemptions from the Charter of Fundamental Rights.¹ Their exemptions are recent examples of a general trend of states formally securing national

¹ Poland was particularly keen to ensure that the Charter of Fundamental Rights did not affect national legislation in the sphere of public morality and family law; the UK was particularly concerned that social and economic rights were included in the same document as civil and political rights; the Czech Republic wanted guarantees that the charter did not expand the competence of the EU (Barnard 2010).

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978-1-107-04321-3 - Opting Out of the European Union: Diplomacy, Sovereignty
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sovereignty through instruments of differentiation. Differentiation is the collective term for rejecting common rules and moving towards a form of co-operation where various member states have different rights and obligations within specific policy areas (Kölliker 2006: 2). National opt-outs and other instruments of differentiation are likely to be used much more as the EU expands geographically, continues to introduce new policies and struggles with eurosceptic populations.

Former Belgium Prime Minister and MEP Guy Verhofstadt did not mince his words when he said: ‘In actual fact, opt-outs constitute a de facto negation of the idea of European cooperation’ (Verhofstadt 2006: 214). Is he correct, are opt-outs a ‘negation of the idea of European cooperation’? Or are they a pragmatic way of integrating states – a testimony to the *sui generis* nature of the EU?

Opt-outs are highly politicised and surrounded by myths. Eurosceptic politicians and media claim that opt-outs protect national sovereignty and can be used as an example to other member states (Giddings 2004: 158; Baker 2001). In contrast, pro-European ministers argue that they lose political influence when they ‘are shown the door’ at Council of Ministers meetings because of the opt-outs (Burkitt and Mullen 2003). As a result, national opt-outs are generally perceived to be controversial, leading to a dangerous fragmentation of the EU. At the same time, opt-outs represent the conviction that it is possible to (re)constitute the boundary of the state in the face of European integration. They draw a symbolic, legal and political line in the sand to establish an area where the state should remain sovereign.

When the Maastricht Treaty (1992) granted the UK and Denmark opt-outs from the Economic and Monetary Union (EMU) and the Area of Freedom, Security and Justice (AFSJ), EU lawyers argued that it would lead to a ‘Europe in bits and pieces’ (Curtin 1993; Weiler 1999), and political scientists predicted a destructive fragmentation of the EU (see Andersen and Sitter 2006). Existing research largely interprets opt-outs from EU treaties as a way to preserve member state sovereignty (Wallace 1997; Moravcsik 1998; Risse 2002). However, the consequences of opting out for the individual member states and the European integration process have yet to be fully explored.

This book has two aims. Empirically, it provides a deeper understanding of the EU as a political project. Using national opt-outs as a lens, it analyses European integration as a member state-driven process, which at the same time transforms the member states. It challenges the

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claim that opt-outs lead to the marginalisation of certain member states and contribute to European disintegration. The book looks at the most controversial form of differentiated integration: the British and Danish opt-outs from the EMU and borders, asylum, migration and justice policies. Thus the analysis covers two of the most important and dynamic policy areas in the EU. More specifically, it analyses how opt-outs contribute to labelling British and Danish officials as certain types of ‘players’ in the EU’s Council of Ministers, the primary diplomatic forum for interstate bargaining in Europe where ministers and officials from the 28 member states negotiate.

Based on this in-depth analysis, I propose a different interpretation: opt-outs may actually reinforce the integration process. The reason for this counterintuitive dynamic is to be found in the diplomatic handling of the controversial sovereignty claims. In fact, the everyday management of opt-outs signals a retreat from national sovereignty rather than an expression of it. As this book shows, sovereignty claims, such as those made as part of the British and Danish opt-outs, become a ‘stigma’ – a discrediting mark on national representatives. Overall, the comparative analysis illustrates that direct sovereignty claims are considered inappropriate in Brussels. In areas where the UK and Denmark have opted out, their countries are perceived as unorthodox or even as threats to the EU’s cohesion. The coping strategies used by British and Danish officials reveal that the EU is partially created through the stigmatisation of transgressive states.

Theoretically, this book develops a political sociology of European integration. As such it seeks to contribute to the so-called practice or sociological turn in EU and IR studies by offering a new interpretation of European integration as an everyday social process. This process is largely driven by a group of unelected national officials who meet to negotiate in Brussels in relative isolation from domestic populations. The book develops an approach to analysing the practices, group pressures and identity constructions inside the EU’s Council of Ministers. This leads to a new understanding of how power relations play out between the member states.

More generally, the book demonstrates how insights from the sociology and anthropology of Pierre Bourdieu and Erving Goffman can be combined. Their work in combination creates a dynamic understanding of the disciplining and exclusionary practices that uphold the EU as a political order – and ways in which this order can be

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successfully challenged. This makes it possible to address an important (yet neglected) aspect of the ongoing struggle to produce an authoritative interpretation of European integration and what it takes to be a (good) member state.

European integration is a radical process. Over the years the EU has changed what it means to be a European state. As this book illustrates, a political sociological approach to integration provides a different and more detailed account of the consequences of European integration for national sovereignty than the dominant theories of ‘liberal intergovernmentalism’ (Moravcsik 1998), ‘multi-level governance’ (Marks 1998), ‘accumulated executive order’ (Curtin and Egebjerg 2008), ‘European Administrative Space’ (Hoffman 2011; Olsen 2009) or ‘post-sovereignty’ (Keating 2004), which all prioritise formal institutions over social processes. This book challenges these conventional explanations and argues that European integration is driven by a body of national representatives struggling to position their nations in diplomatic settings. European integration is neither the result of promoting domestically defined preferences (Moravcsik 2004; Pollack 2010) nor merely the outcome of multilevel governance. By examining how sovereignty claims are managed in practice, the book draws attention to the finer points of day-to-day European integration, such as diplomatic negotiations. This is where we encounter what is otherwise an entirely abstract phenomenon, reified with the label ‘the state’.

The book shows that a ‘late sovereign diplomacy’ grows out of day-to-day negotiations in the Council of Ministers and its hundreds of working groups. Leading political forces in the European states now see their nations as so deeply rooted within the supranational institutions of the EU that they blur their national interests with those of the EU. Political and legal authorities overlap, territorial exclusivity is replaced by functional boundaries and states begin to speak with one voice. As a result of over 50 years of painstaking work by officials from the European states, a social field has developed – an autonomous social system comprising a pattern of practices and shared meanings, where certain rules and roles result in competent action. An analysis of this field, its logic and the way in which states are punished for breaching its tacit rules provides a deeper insight into the diplomatic handling of the political, economic and social crises – as well as the stability of the European integration project. The EU is a fragile organisation maintained by *une certaine idée* about Europe, which requires constant care

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and attention from member states. This is why national diplomacy is so crucial to European integration.

Opting out to safeguard sovereignty

This book focuses on how the British and Danish opt-outs from the euro, common borders and Area of Freedom, Security and Justice (AFSJ) are managed. The proliferation of British opt-outs has contributed to the image of the UK as the ‘awkward partner’ (George 1994; Rosamond 2004; Geddes 2013) and a ‘stranger in Europe’ (Wall 2008). Because of the UK’s opt-outs, observers underline the ‘paradoxes’ and ‘tensions’ in Danish EU policy (Kelstrup 2006; Miles 2005b). This book examines what lies behind these labels.

With the Maastricht Treaty (1992), the EU pressed forward with its ambitious plans to create a common currency, eliminate national border controls, introduce common asylum and immigration policies, and establish EU citizenship and a common foreign policy. Two states – the UK and Denmark – were particularly reluctant to surrender authority in these areas and this almost destroyed the treaty. The domestic political debates in both the UK and Denmark revolved around national identity being undermined, and control over daily lives and money being surrendered to faceless foreign bureaucrats. In the UK, ‘Maastricht’ became synonymous with the creation of a federal superstate and generated ‘the longest lasting and arguably the deepest’ division over the UK’s relationship with Europe since the Second World War (Baker and Seawright 1998: 2). In Denmark, a range of specific issues were grouped under the banner of sovereignty, including the fear of an army of federal armed forces; the presence of foreign police officers on Danish soil; the application of EU law to sensitive questions of criminal justice; a common currency; the perception of a self-amending treaty; and the enhanced role of the European Parliament and EU citizenship (Hansen 2002).

To prevent the UK from blocking the Maastricht Treaty, it was granted opt-out clauses, which meant that it did not have to participate in the third stage of the EMU and the Social Chapter. These two Maastricht innovations had been the most controversial for the UK. Even then, parliamentary ratification was challenged by the opposition Labour and Liberal Democrat MPs, and crucially by the ‘Maastricht Rebels’ within the governing Conservative Party (Ludlam 1998: 33ff). The long

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and agitated debates about the Maastricht Treaty in Westminster revealed a bitterly divided political landscape. Parliamentarians were arguing over a treaty that they thought would impact not just on the British position in the global political economy but also on ‘the very sovereignty of the British nation’ (Baker et al. 1995: 53). As part of the Amsterdam Treaty (1997), the UK was given an opt-out from the Schengen agreement (abolishing controls and checks at national borders between EU member states) and the possibility of opting in to Title IV TEC (Treaty establishing the European Community) dealing with ‘visas, asylum, immigration and other policies related to free movement of persons. Apart from these treaty opt-outs, the UK has been granted exemptions from secondary legislation, most famously perhaps by opting out of the working time directive (Barnard et al. 2003). As Gifford concludes, ‘Clearly, the principle of opt outs and “red lines” in European negotiations has become enshrined as the British way of dealing with the EU’ (Gifford 2010: 326).

Denmark was also a reluctant negotiator in Maastricht. However, when it was granted a protocol on the EMU, the Danish government accepted the treaty. At the political level, a broad consensus was established between the government parties (Conservatives, Liberals and Social Liberals) and the Social Democratic Party over the Maastricht process. Against this backdrop the Danish Parliament voted overwhelmingly for the Maastricht Treaty in the spring of 1992. However, this was followed by the unexpected rejection by the Danish population in a referendum in June 1992. The Danish *nej* (and the narrow French *oui*)² came as a shock to EU leaders and led to a dramatic ratification crisis. It was clear that the European populations no longer just accepted or ignored integration. As Lord notes, ‘More than any other single event, it was the crisis in 1992–3, provoked by the ratification of the Maastricht Treaty on European Union (TEU), which shattered any illusion that the legitimising of EU power was a “non-problem”’ (Lord 2000: 4). In Weiler’s words, the Maastricht crisis was ‘the beginning or end of a deeper process of mutation in public ethos or societal self-understanding’ (Weiler 1999: 3). Whether or not one accepts the rejection and ratification crisis of the Maastricht Treaty as a ‘constitutional moment’ (Weiler

² Despite expectations of a landslide, the French public barely approved the Maastricht Treaty in 1992; voters were largely concerned about the sovereignty of France (Lewis-Beck 2007).

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1999: 3), the so-called permissive consensus appeared to be a thing of the past.

Following the Danish referendum in June 1992, the Social Democrats, together with a majority in the Parliament, demanded significant revisions in the form of exemptions, which would make the treaty acceptable to the public in another referendum. These elements constituted the so-called ‘National Compromise’, which the government had to accept in October 1992.³ In December 1992 the four demands of the National Compromise were accepted by the European Council in the ‘Edinburgh Decision’. The decision focused on the main topic in the Danish referendum debate: the transfer of national sovereignty to the EU. Four key opt-outs were attached to the treaty: Denmark would not adopt the euro; European citizenship would not replace national citizenship; Denmark would not participate in the development of a common European defence; and Denmark would not participate in supranational AFSJ co-operation.

On 18 May 1993, 56.7 per cent of Danes voted ‘yes’ to the four opt-outs, which meant that Denmark could ratify the Maastricht Treaty. However, opposition groups argued that the opt-outs were an illusion and that, even with the Edinburgh Decision, Denmark was on a slippery slope towards a European federal state. The ‘yes’ vote triggered riots in Copenhagen, which were considered to be among the worst in Denmark’s peacetime history. On the night of the second Danish referendum, Danish police shot into a crowd of demonstrators who had created an ‘EU-Free Zone’ in Nørrebro, a district in the centre of Copenhagen. At least 11 people were injured in the shooting and the ‘Nørrebro night’ is still a very sensitive issue in Denmark. Memories of the event have left Danish police suffering from a traumatic ‘Vietnam syndrome’ (Scharling 2003).⁴

³ The National Compromise could ‘unite the population on Denmark’s continued participation in the EC’. In the document, the ‘no’ is carefully interpreted as a rejection of the ‘United States of Europe’, but not as a rejection of European Communities (EC) membership or European co-operation. With this interpretation the agreement created a united Danish people, to be politically represented in the opt-outs and to legitimise continued EU membership (<www.euo.dk/dokumenter/traktat/eu/nationalkompromis/> Adopted by all parties in Parliament with the exception of the Progress Party, 27 October 1992, author’s translation).

⁴ See the official report published on 18 May 1993 entitled *Beretning i henhold til lov nr. 389 af 22. maj 1996 om undersøgelse af Nørrebrosagen* (‘Report pursuant

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The sharp contrast between outraged anti-EU demonstrators in the streets of Copenhagen and more pragmatic governments negotiating in the glass-and-steel buildings in the Quartier Européen of Brussels show how sensitive opt-outs can be. These two images reveal a mental and physical gulf between large segments of the European populations who are attached to various concepts of national sovereignty and a Europeanised body of politico-administrative elites in Brussels who are focused on securing a strategically advantageous position for their country in Brussels.

While British and Danish governments may point out the detrimental effects of opt-outs on their country's position in the EU, they still have to guarantee to their citizens that they respect the protocols. In the UK and Denmark, the opt-outs are interpreted as bulwarks against European integration and symbolise the preservation of national sovereignty – emphasising an image of the state with full political and legal authority over people, territory and currency – which makes them seem almost sacrosanct. As a result, during the Constitutional Treaty negotiations, the British government said that the opt-outs would not be touched by what former Secretary of State Jack Straw called a 'simple tidying-up exercise' (Church and Phinnemore 2006: 8). Likewise, Danish Prime Minister Anders Fogh Rasmussen promised that the opt-outs would be safeguarded and that the Danish people would remain in full control:

There will be no trickery. There will be no cherry picking. The opt-outs will stand clear and clean in the new treaty. And the Danish people shall decide on this treaty including the opt-outs. (Rasmussen 2003)

Domestically, opt-outs produce a fiction of national unity and fabricate a united domestic public despite apparent political disagreements over the EU issue. As such, the opt-outs do not just define a relationship between the state and the EU but also mediate between different domestic sub-audiences. Elsewhere I have looked at how opt-outs as a claim to sovereignty are constantly reconfigured by government representatives who present different 'truths' about the opt-outs to the domestic and the European audience, respectively, leading to 'organized duplicity' (Adler-Nissen 2008a). In this book I will focus primarily on the Brussels scene and less on the domestic scene. While domestic politics is crucial to why the UK and Denmark opted out, it – surprisingly perhaps – plays a lesser

to act no. 389 of 22 May 1996 on the investigation of the Nørrebro case') and the special issue of the magazine *Dansk Politi* ('Danish Police') (2003, no. 5).

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role in the everyday management of the opt-outs in the Council of Ministers.

Opt-outs raise controversial questions about the degree of solidarity between member states and the political, legal, social and philosophical limits to European integration. In seemingly tedious treaty protocols, politicians (and ordinary citizens) have invested a lot of energy in discussing sovereignty, identity and democracy. So the image of an autonomous state is sought and preserved at home via the opt-out, despite the state's continuous entanglement in the European integration process. On the European scene, the opt-outs change from being a principled stance against more integration to a more flexible position, which allows ministers and diplomats to choose from the buffet of new EU initiatives. As such, opt-outs, and the diplomatic strategies surrounding them, serve as a prism for understanding the transformation of sovereignty in the EU.

A crucial case of differentiation

The British and Danish opt-outs are seen as the most controversial and high-profile protocols in the EU. A continuum of opt-outs exists, ranging from heavily debated policy areas, such as the EMU, Schengen and the common security and defence policy, to relatively uncontroversial protocols on reindeer husbandry in Finland and Sweden, the acquisition of second homes in Malta (and Denmark) and Swedish chewing tobacco (*snus*). Specific derogations at primary law level in favour of some member states are not a new phenomenon (Hanf 2001: 7), but most of these protocols have a limited effect and do not threaten the cohesion of the EU.⁵

Contrary to protocols with minor opt-outs or transition periods, on, for example, the free movement of people when a new state joins the EU, a number of member states have been granted permanent opt-outs in the last two decades, which have had extensive consequences. Apart from the UK and Denmark, Ireland is the only member state with major exemptions from 'Freedom, Security and Justice'; however, so far Ireland mainly follows the UK and will not be considered further in

⁵ Germany's 'Banana Protocol', attached to the Rome Treaty (1957), which allowed duty-free access for Central and Latin American bananas into Germany, was also controversial (see Alter and Meunier 2006).

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this book.⁶ Sweden has a de facto opt-out in the EMU (it has thus far evaded the obligation to join the EMU by failing to satisfy certain criteria), but only the UK and Denmark have formal opt-outs in this area. In other words, the UK and Denmark are the current opt-out champions. Being granted an opt-out is very difficult to achieve, as newer member states (e.g. Poland and the Czech Republic) and prospective members (e.g. Norway) have experienced. During the latest enlargement negotiations, the European Commission (on behalf of the EU) ‘saw it fit to rule out any opt-out possibilities for the candidate countries. The *acquis* is one of the most sacred of EU concepts and is expressly designed to prevent any prospective member of “shopping around” for its own mix of obligations’ (Tatham 2009: 331–332).⁷

Opt-outs are an established part of the EU, while ‘enhanced co-operation’ (where a minimum of nine EU member states can establish advanced integration or co-operation in an area within EU structures but without the other members being involved) has only been applied twice – in the fields of divorce rules and patents, and it is approved for the field of a financial transaction tax. There are also many examples of breakaway groups of member states that have co-operated more closely outside the treaties. Usually, however, this co-operation ends up being codified in the treaties after some years, as the Schengen and EMU co-operation illustrate.

In summary, the British and Danish opt-outs appear to fly in the face of the very idea of an ever closer union. They present us with a most-likely case: if opt-outs do help to safeguard national sovereignty and threaten integration as we know it, this is most likely to show in the British and Danish cases. However, if British and Danish national exemptions are dissolved, as this book demonstrates, we have reason

⁶ For an interesting account of how Ireland has been forced to follow the UK in the AFSJ to save the Common Travel Area, see Meehan (2000a; 2000b) and Laffan and O’Mahony (2008). Ireland has attached a declaration to the Lisbon Treaty ensuring that Ireland only participates in EU military operations if there is a UN mandate and the majority of the Irish Parliament backs the decision (see Hummer 2006). However, compared with the Danish defence opt-out, which ensures that Denmark does not participate in the military dimensions of the European Defence and Security Policy, the Irish declaration is much less restrictive.

⁷ ‘It would therefore appear that only current Member States can successfully argue for opt-outs from new policy developments; such point appears to be confirmed as much by the current British, Danish and Swedish opt-outs from the latest stages of the EMU’ (Tatham 2009: 331–332).